IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No.

MOSE HIGHTOWER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of ~~The United States~~.

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(Petitioner has furnished ten copies of the printed record used in the Supreme Court of Illinois)

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To the Honorable Chief Justice and Associate Justices of the United States:

Your petitioner, Mose Hightower, states that he is presently serving a sentence of from not less than 20 nor more than 30 years in the Illinois State Penitentiary. He was adjudged guilty and sentenced by the Criminal Court of Cook County in Chicago, Illinois. The Supreme Court of Illinois, at Springfield, reviewed and affirmed his conviction. He prays that a Writ of Certiorari issue to the Supreme Court of Illinois to review the judgment of affirmance of that court. In support thereof, petitioner shows as follows:

I.

SUMMARY AND SHORT STATEMENT OF THE CAUSE.

A. Jurisdictional Statement:

The opinion of the Supreme Court of Illinois was filed in the cause on October 31, 1960. The jurisdiction of this court is invoked pursuant to the provisions of Supreme Court Rule 38½, Title 28, U.S. Code Annotated, Section 1257, and Title 28, United States Code Annotated, Section 2101 (C). Petitioner files this petition within 90 days after the judgment of the Supreme Court of Illinois, the highest court of Illinois which may have heard the cause, pursuant to the provisions of the aforesaid rule and statutes.

B. Judgment and Opinion of Court Below:

The opinion of the Supreme Court of Illinois is annexed hereto as Appendix I. It is reported at 20 Ill. 2nd 361; 169 N.E. 2nd 787.

C. Statement of the Case:

Petitioner was indicted by the Cook County Grand Jury of having made an unlawful sale of narcotic drugs to a person in Cook County on May 20, 1959. He pleaded not guilty before the Criminal Court of Cook County, and, before his trial began, he was permitted to and did move the Court to suppress an amount of United States currency which had been taken from the top of the dresser in the bedroom of his apartment immediately after his arrest, and, in support of the said motion he filed a written peti-

tion alleging that the search and seizure whereby the currency was discovered and seized was unconstitutional and in violation of the rights guaranteed him by the Fourth Amendment to the Constitution of the United States, as well as in violation of those rights guaranteed to him by the Constitution of Illinois. The trial court overruled his motion to suppress evidence. He was tried, convicted upon the evidence sought to be suppressed and sentenced to from 20 to 30 years in the Illinois State Penitentiary. On prosecution of a writ of error in Supreme Court of Illinois, that court expressly affirmed the trial court's action overruling petitioner's motion to suppress evidence and affirmed the conviction. The Court expressly found that defendant's rights under Fourth Amendment to the United States Constitution had not been violated and, we think erroneously, based this holding on the opinion of this United States Supreme Court in *United States* v. *Rabinowitz,* 339 U.S. 56, 94 L. ed. 653.

II.

QUESTIONS PRESENTED FOR REVIEW.

A. Was the arrest of petitioner without a warrant lawful so as to sustain a search of his home and his effects without a warrant as lawful and without the prohibition of the Fourth Amendment to the United States Constitution?

B. If the arrest of petitioner was lawful, did the subsequent search of his home and effects violate his rights under the Fourth Amendment; that is, was the search of his home incidental to his arrest as a matter of law, so that the search of his apartment without a warrant can be declared to be legal and not in violation of the provisions of the Fourth Amendment to the United States Constitution?

The provisions of the Fourth Amendment to the United States Constitution are as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

III.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

A. After reciting the facts shown at the hearing of the petitioner's motion to suppress evidence, the Supreme Court of Illinois cited the opinion of this Supreme Court of the United States in the case of the *United States* v. *Rabinowitz*, 339 U.S. 56, 94 L. ed. 653, as its chief authority that the search in this case of defendant's apartment was not unreasonable, within the prohibition of the United States Constitution. The Supreme Court of Illinois misinterpreted the principles of the *Rabinowitz* case and misapplied the holding in that case to the facts in the case at bar.

B. Petitioner attacked the search and seizure in the case at bar as a violation of his rights under the Fourth Amendment to the United States Constitution at the time he made his motion to suppress evidence in the trial court, and, on prosecution of his writ of error in the Supreme Court of Illinois he urged the same point. The Supreme Court of Illinois decided the question in a way not in accord with the applicable decisions of this Supreme Court of United States. The Supreme Court of Illinois held in effect that a search made upon a lawful arrest of itself permits the search of premises "under the control of" the arrestee. The decisions of this Supreme Court of the United States do not permit a search without a warrant of all property "under the control of" the arrestee in every fact situation, and the past decisions of this Court have defined the phrase "under the control of" in a man-

ner which does not include an entire home of an arrestee or all property he may own, etc. Decisions of this Supreme Court of the United States, in numerous cases, are in direct conflict with the decision of the Supreme Court of Illinois that the search of defendant's apartment and the search and seizure of his money is not prohibited by the provisions of the Fourth Amendment.

C. The opinions of this Court in the cases of *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, and *The United States* v. *Lefcovitz*, 285 U.S. 452, and cases cited in them, are applicable to the case at bar, and are in conflict with the holding of the Supreme Court of Illinois that the search of petitioner's home and effects is not unreasonable and is not prohibited by the Fourth Amendment.

D. The opinion of the Supreme Court of Illinois that the arrest of petitioner was lawful is in conflict with the opinion of this Supreme Court in the case of *United States* v. *Di Re*, 332 U.S. 581.

IV.

SUPPORTING BRIEF.

A. Statement of Facts:

Petitioner, Mose Hightower, was arrested at the front door of his apartment at 7919 Champlain Avenue, Chicago, by Federal Narcotics agents at about 3 o'clock on the morning of May 21, 1959. After his arrest a general search of his apartment was conducted while he was in custody in the front room. One of the agents entered his bedroom and saw and took more than $300.00 in United States currency from the top of a dresser. A search was made through this currency for bills which might have serial numbers corresponding to those on a list the agents had made. The agents kept $10.00 of the money which one of them said was part of $70.00 that had previously been supplied to a decoy. The agents had not obtained and did not possess any warrant for the arrest of Hightower or the search of his apartment or effects, nor had Hightower committed any offense in their presence, and no crime was being committed in the apartment.

Federal narcotics agents Irvin and Heisig had contacted the decoy on May 19, 1959, and sent him into a building at 756 East 37th Street, Chicago, to purchase narcotics. The decoy returned empty-handed but stated that he had ordered narcotics from one Frank Duncan of the 37th Street address, and, that Duncan had said he would get a new supply from "Cotton" and deliver the next morning. Hightower was sometimes called "Cotton."

On May 20, 1959, agents Heisig and Irvin met the decoy and supplied him with "marked" money. He entered a building at the 37th Street address and returned three hours later with narcotics. The agents then entered the apartment and arrested one Lolita Mallory and Duncan. Duncan mentioned that Hightower was the "source of his supply" and that he had instructed Mallory to get the narcotics from Hightower. Duncan furnished a telephone number, TRiangle 4-3289, which was listed to a person at 7919 Champlain. Later, Heisig, Irvin and another agent went to that address, rang the bell, and Hightower opened the door. Heisig identified himself as an officer and placed Hightower under arrest. The searches and seizure complained of followed.

At the time of the arrest, no one had told the agents that narcotics had been purchased from Hightower. (Abs. 14).

The Illinois Supreme Court held that the arrest was lawful and the search of the apartment reasonable and not within the prohibition of the Fourth Amendment to the United States Constitution. The Court did not distinguish the search of the effects of Hightower from the search of his apartment.

B. Points and Authorities:

1. The Illinois Supreme Court incorrectly predicates its judgment that the search and seizure in the case at bar is not unreasonable within the prohibition of the United States Constitution upon the opinion of this Supreme Court of the United States in the case of United States v. Rabinowitz, 339 U.S. 56, 94 L. ed. 653.

United States v. Rabinowitz, 339 U.S. 56, 94 L. ed. 653.

2. The opinion of the Supreme Court of Illinois is in direct conflict with the opinions of the United States Supreme Court rendered in the cases of Go-Bart Importing Co. v. United States, 282 U.S. 344, and United States v. Lefkowitz, 285 U.S. 452, and cases cited therein.

United States v. Lefkowitz, 285 U.S. 452.

Go-Bart Importing Co. v. United States, 282 U.S. 344.

Gouled v. *United States*, 255 U.S. 298, 307.

Agnello v. *United States*, 269 U.S. 20, 33.

Boyd v. *United States*, 116 U.S. 616, 623.

Federal Trade Commission v. *American Tobacco Co.*, 264 U.S. 298, 306.

Byars v. *United States*, 273 U.S. 28, 32.

United States v. *Kirschenblatt*, 16 F. (2d) 202, 203.

Entick v. *Carrington*, 19 How. St. Tr. 1029.

McCulloch v. *Maryland*, 4 Wheat. 316, 406, 407, 421.

3. The Supreme Court of Illinois confused the meaning of opinions of this court concerning the seizure of evidence of crime which is in plain view in the premises at the time of the arrest of the suspected offender.

Marron v. United States, 275 U.S. 192.

Go-Bart Importing Co. v. United States, 282 U.S. 344.

United States v. Lefkowitz, 285 U.S. 452.

Boyd v. *United States,* 116 U.S. 616.

Weeks v. *United States,* 32 U.S. 383, 395.

4. The reliance of the Illinois Supreme Court on the opinion of this Supreme Court of the United States in the case of Draper v. United States, 358 U.S. 307, 3 L. ed. 2nd 327, as an authority that the search of defendant's home and effects is not within the prohibition of the Fourth Amendment is incorrect, for the reason that the Draper case is distinguished on its facts.

Draper v. United States, 358 U.S. 307, 3 L. ed. 2nd 327.

United States v. Di Re, 382 U.S. 581.

Fourth Amendment to the United States Constitution.

C. Argument:

1. The Illinois Supreme Court incorrectly predicates its judgment that the search and seizure in the case at bar is not unreasonable within the prohibition of the United States Constitution upon the opinion of this Supreme Court of the United States in the case of United States v. Rabinowitz, 339 U.S. 56, 94 L. ed. 653.

The facts in the *Rabinowitz* case are distinguished from those in the case at bar and the principles therein announced do not justify the search and seizure in this case. It will be noted in the case at bar that the federal agents, without any warrant, arrested Hightower at his door and took him in the livingroom. The apartment was then searched. One agent went into his bedroom where he saw a large amount of money, more than $300.00 in bills, on the top of his dresser. Actually there were two searches at the time, one, the search whereby the agent discovered the money, and the other, the search conducted among the large number of bills to discover the $10.00 which was unsuccessfully sought to be suppressed, and which was introduced as evidence against petitioner. Thus, Hightower's house was searched in violation of the provisions of the Fourth Amendment and his effects were also searched in violation of those provisions. The Supreme Court of Illinois completely ignores the second search—that is, the search of the effects of Hightower and stated a simple rule of thumb:

> "Since the decision in *United States* v. *Rabinowitz*, 339 U.S. 56, 94 L. ed. 653, it has become an established principle that the premises where an arrest is validly made, under the control of the person arrested, are subject to search without a search warrant, and that such search is not unreasonable within the provisions of the United States Constitution."

Rabinowitz did not so hold. In *Rabinowitz* this Court held that what is a reasonable search may not be determined by any fixed formula, and that the recurring questions of reasonableness of searches must find resolution in the facts and circumstances of each case. The Supreme Court of Illinois has misinterpreted Rabinowitz as setting a fixed formula.

In *Rabinowitz*, the Court considered the following facts which do not appear in the case at bar:

1. The place of the search was a business room to which the public, including the officers, was invited.

2. The room was small and under the immediate and complete control of Rabinowitz.

3. The search did not extend beyond the room which had been used for the unlawful purpose of selling four forged postage stamps, this offense being within the personal knowledge of the arresting agents.

The public was not invited into Hightower's home. The officers entered after announcing to Hightower that they were police officers, and they placed him under arrest immediately. Nothing in the record shows that Hightower's apartment had been used for any unlawful purpose. Hightower's apartment consisted of not one, but several rooms, and when the bedroom was searched he was not in it.

Not one officer could or did say that he knew upon looking at the large number of bills on Hightower's dresser, or that he had reason to know that among those bills was any part of the money connected with a transaction which had admittedly taken place blocks away from Hightower's apartment. We do not believe that *Rabinowitz* meant to hold that ownership of an apartment is sufficient to jus-

tify a search of it after even a valid arrest therein for something that occurred elsewhere.

It appears that *Rabinowitz* does not overrule other cases decided by this Supreme Court concerning the question when searches of premises are incidental to an arrest so that they may be made without a warrant. The most important principle of Rabinowitz is to overrule the holding in *Trupiano* v. *United States*, 334 U.S. 699, to the extent that it requires a search warrant solely upon the basis of the practicability of procuring it, rather than upon the reasonableness of the search after a lawful arrest.

2. The opinion of the Supreme Court of Illinois is in direct conflict with the opinions of the United States Supreme Court rendered in the cases of Go-Bart Importing Co. v. United States, 282 U.S. 344, and United States v. Lefkowitz, 285 U.S. 452, and cases cited therein.

In *Go-Bart* a Federal agent had obtained a warrant for the arrest of the petitioners. Armed with this arrest warrant, agents arrested petitioners on a charge of conspiracy to engage in unlawful traffic in intoxicating liquor. The arrest took place in an office in which petitioners engaged in business. Under threats of force, petitioners were compelled to open a desk and safe and the agents searched them as well as other parts of the office, and took therefrom papers, journals, account books, letter files and other papers belonging to petitioners. Petitioners moved to suppress the use of these "papers" as evidence against them on the ground that the search and seizure of them was in violation of the rights guaranteed them by the Fourth and Fifth Amendments to the United States Constitution. Their motions were denied and a Court of Appeals affirmed the denial. In reversing the Court of Appeals and hold-

ing that the search was not incidental to the arrest and was in violation of the provisions of the Fourth Amendment, this United States Supreme Court said:

"Without pausing to consider the matter, we assume, as held by the lower courts, that the facts of which Calhoun and O'Brien had been informed prior to the arrests are sufficient to justify the apprehension without a warrant of Gowen and Bartels for the conspiracy referred to in Braidwood's affidavit and on that basis we treat the arrests as lawful and valid.

"No question is here raised as to the search of the persons. There remains for consideration the question whether the search of the premises, the seizure of the papers therefrom and their retention for use as evidence may be sustained. The first clause of the Fourth Amendment declares: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.' It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken. *Gouled* v. *United States*, 255 U.S. 298, 307. The second clause declares: 'and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state in the Union. *Agnello* v. *United States*, 269 U.S. 20, 33. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the

duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. *Boyd* v. *United States*, 116 U.S. 616, 623. *Weeks* v. *United States, supra*, 389-92.

"There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested. In April, 1929, Braidwood reported to Calhoun the existence of a conspiracy and that in pursuance of it sales and deliveries of intoxicating liquor had been made in 1927 and 1928. The record does not show any criminal overt act in 1929. Calhoun's description to O'Brien of the company's office in detail and of Gowen and Bartels shows that he knew the place and offenders. Notwithstanding he had an abundance of information and time to swear out a valid warrant, he failed to do so. O'Brien falsely claimed to have a warrant for the search of the premises and he made the arrests under color of the invalid warrant. By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, 306."

It will be noted that in the case at bar the agents admitted that Hightower's apartment was searched and that it was in the course of this search that $300 of his money was seized from the top of the dresser in his bedroom, and that this money was searched. It will also be noted that in the case at bar the officers did not have an arrest warrant as in *Go Bart*, a matter which we will discuss at a

later point herein. The evidence seized from Hightower was not seized from his person, and was obviously not in his immediate possession, but was in his home separate and apart from himself. It does not appear why the officers failed to obtain a warrant, either for his arrest or for the search of his home and effects.

We invite the court's special attention to the statement in *Go-Bart* that there is no formula for the determination of reasonableness of searches. Each case is to be decided on its own facts and circumstances. We also invite the Court's attention to the emphasis placed by *Go-Bart* upon the fact that the officers could not claim that they saw a conspiracy being committed in the office of petitioners. Neither was it claimed nor could it be claimed that any offense was being committed by Hightower in his home at the time of his arrest or at the time of the search thereof.

In *United States* v. *Lefkowitz*, 285 U.S. 452, the agents who arrested petitioner in his 10 by 20 foot room which was divided by a partition were armed with an arrest warrant. The arrest here was also for unlawful traffic in intoxicating liquor. The agents entered the room, arrested Lefkowitz, and proceeded to search the room where they found and seized papers and other things to be used as evidence against him. They searched drawers, desks and a cabinet. The desks and cabinet were not locked. They also searched waste baskets. Lefkowitz moved to suppress the evidence and his motion was denied. A Court of Appeals reversed the judgment, holding that the search of Lefkowitz's person was lawful but the search of his office desks, cabinets and waste baskets was unlawful and in violation of the rights guaranteed by the Fourth Amendment. This Court said:

"The only question presented is whether the searches of the desks, cabinet and baskets and the seizures of the things taken from them were reasonable as an incident of valid arrests under the warrant. Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the Act. Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken.

"The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. *Byars* v. *United States*, 273 U.S. 28, 32. Its protection extends to offenders as well as to the law abiding. *Weeks* v. *United States*, 232 U.S. 383. *Agnello* v. *United States*, 269 U.S. 20, 32. The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. *United States* v.

Kirschenblatt, 16 F. (2d) 202, 203; *Go-Bart Co.* v. *United States*, *supra*, 358.

"Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled* v. *United States*, 255 U.S. 298, 310.

"• • • Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers, or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime. *Boyd* v. *United States*, 116 U.S. 616, et seq; *Weeks* v. *United States*, 232 U.S. 383, 395; *Gouled* v. *United States*, *supra*, 306. *Carroll* v. *United States*, *supra*.

"In *Entick* v. *Carrington*, 19 How. St. Tr. 1029, Lord Camden declared that one's papers are his dearest property, showed that the law of England did not authorize a search of private papers to help forward conviction even in cases of most atrocious crime, and said (p. 1073): 'Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain, that the law obligeth no man to

accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.'

"The teachings of that great case were cherished by our statesmen when the Constitution was adopted. In *Boyd* v. *United States, supra,* 630, this Court said:

'The principles laid down in this opinion (*Entick* v. *Carrington*) affect the very essence of constitutional liberty and security * * * They apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life * * * A forcible and compulsory extraction of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.' And this Court has always construed provisions of the Constitution, having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. *McCullough* v. *Maryland,* 4 Wheat. 316, 406, 407, 421; *Boyd* v. *United States, supra; Byars* v. *United States, ubi supra.*

"This case does not differ materially from the *Go-Bart* case and is ruled by it. An arrest may not be used as a pretext to search for evidence. The searches and seizures here challenged must be held violative of respondents' rights under the Fourth and Fifth Amendments. Affirmed."

We call this Court's attention to the controlling principle announced by it in the case of *Agnello* v. *United States,* 269 U.S. 20, 46 Sup. Ct. 4: "That the protection of the Fourth Amendment extends to all equally, to those

justly suspected or accused as well as to those innocent, the search of a private dwelling without a warrant is, in itself, unreasonable and repellent to our laws."

3. The Supreme Court of Illinois confused the meaning of opinions of this court concerning the seizure of evidence of crime which is in plain view in the premises at the time of the arrest of the suspected offender.

The opinion of the Illinois Supreme Court that there was no search for the money because it was in plain view on top of the dresser in Hightower's bedroom overlooks the fact that the agents had supplied only $70.00 marked money to the decoy, and that there was more than $300.00 on Hightower's dresser, among which was found only $10.00 of the supplied money. This $10.00 was not in plain view.

It is obvious in the record that the agents searched through Hightower's personal effects, these effects being $300.00 of his money, being not in his immediate personal possession and control, but being where it had a right to be, secure in his home on top of his bedroom dresser. A search of these effects was conducted by these police officers in order to discover the $10.00 evidence.

In both *Lefkowitz* and *Go-Bart*, the Government raised a similar "plainview" contention. Their contention was based upon the opinion of this Court rendered in *Marron v. United States*, 275 U.S. 192. In *Lefkowitz* the *Marron* case was distinguished as follows:

> "These searches and seizures are to be distinguished from the seizure of a ledger and some bills that was sustained in the *Marron* case. There prohibition officers lawfully on the premises searching for liquor described in a search warrant, arrested the bartender

for crime openly being committed in their presence. He was maintaining a nuisance in violation of the Act. The offense involved the element of continuity, the purchase of liquor from time to time, its sale as a regular thing for consumption upon the premises and other transactions including the keeping of accounts. The ledger and bills being in plain view were picked up by the officers as an incident of the arrest. No search for them was made. The ledger was held to be part of the outfit actually used to commit the offense. The bills were deemed so closely related to the business that it was not unreasonable to consider them as employed to carry it on. While no use was being made of the book of papers at the moment of the arrest, they—like containers, chairs and tables for customers, the cash register glasses and supplies—were kept to be utilized when needed. The facts disclosed in the opinion were held to justify the inference that when the arrest was made the ledger and bills were in use to carry on the criminal enterprise.

"Here the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, papers or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to void payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime. *Boyd* v. *United States*, 116 U.S. 616, et seq. *Weeks* v. *United States*, 232 U.S. 383, 395. *Gouled* v. *United States*, *supra*, 306. *Carrol* v. *United States*, *supra*."

In the case at bar Hightower's money on his dresser was unoffending. He was committing no crime in the presence of the arresting officers and, in fact, the crime with which he was suspected of having some connection had been committed at another place many hours before his arrest.

In *Go-Bart* this Court said as follows:

> "Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U.S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force of general search or rummaging of the place."

There was a general search of Hightower's apartment, and, an entry made into the most private quarters of his home, that is, his bedroom. We contend that the fact that subsequently the officers after a meticulous search discovered among the money that he had lying on his dresser $10.00 of "marked" money, is not sufficient to bring the search of his house and effects outside the prohibition of the Fourth Amendment.

4. The reliance of the Illinois Supreme Court on the opinion of this Supreme Court of the United States in the case of Draper v. United States, 358 U.S. 307, 3 L. ed. 2nd 327, as an authority that the search of defendant's home and effects, is not within the prohibition of the Fourth Amendment is incorrect, for the reason that the Draper case is distinguished on its facts.

In the *Draper* case the arresting agents did not rely upon the mere statement of a person arrested that defendant

was the "source of his supply" of narcotics, but these agents, as carefully noted in the opinion, had had previous dealings with their informer and good and sound reason to rely upon his statements. There was no reason to rely upon the statement of the informer in the case at bar, especially where the person who allegedly procured the narcotic drugs for delivery to the informer, had not informed them of any connection with petitioner Hightower. The arrest of Hightower was thus predicated on the most flimsy of grounds and it was effected without a warrant. The arrest itself was "exploratory." The person who stated that Hightower was the source of his supply could not state from where the narcotics in question was procured because he had not procured them. This the officers knew.

We cite the opinion of this Court in the case of *The United States* v. *Di Re*, 332 U.S. 581, as conclusive authority for the proposition that the arrest of the petitioner was unlawful, and that the trial court erred in overruling his motion to suppress evidence, and the Supreme Court of Illinois erred in sustaining the trial court.

Di Re was arrested by officers who had no knowledge that he was implicated in a crime. Their informer, as in the case at bar, did not implicate the defendant in the crime under investigation. We pause here to say that if Hightower was implicated at all, it was in a most general and unsatisfactory fashion. His implication was not that he had supplied the narcotics under investigation, but that he was the source of supply on some previous occasion. We emphasize again that this information did not come from the person who had actually obtained the drugs, but from the person to whom she delivered them for delivery to the decoy. This Court in *Di Re* held that the arrest

of *Di Re* was unlawful and that the subsequent search of his person was therefore unlawful and unconstitutional, and that the evidence seized upon the search, and used as a basis of his conviction, was therefore unlawfully obtained. We point out that the *Di Re* case involved a search of the person of the defendant, not a search of his house and his effects as in the case at bar, and that if the facts of the *Di Re* case were sufficient to bring the seizure of things from his person within the prohibition of the Fourth Amendment, certainly the facts in the case at bar are sufficient to bring the search of Hightower's apartment and effects within that prohibition.

CONCLUSION.

For the foregoing reasons we urge this Court to issue a Writ of Certiorari to the Supreme Court of Illinois to the end that the judgment of that Court affirming petitioner's conviction and sentence may be reversed.

Respectfully submitted,

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APPENDIX.

Opinion rendered by the Supreme Court of Illinois, Docket No. 35823—Agenda 22—September, 1960, filed October 31, 1960.

Mr. Justice Daily delivered the opinion of the court:

After a bench trial in the criminal court of Cook County, the defendant, Mose Hightower, was convicted of unlawfully possessing and selling narcotic drugs and was sentenced to the penitentiary for a term of not less than twenty nor more than thirty years. He prosecutes this writ of error for review contending that certain money used as evidence was seized in violation of his constitutional rights, and that he was not proved guilty beyond reasonable doubt.

Facts pertinent to defendant's contentions, as developed both at a hearing to suppress the money as evidence and at the subsequent trial, show that on May 19, 1959, Federal narcotics agents Edmund Irvin and Theodore Heisig proposed to Herbert Fohrman, described as a special employee, that he attempt a purchase of narcotics from the occupants of a building at 736 E. 37th Street in Chicago. Fohrman went to the building the same day and was told by Frank Duncan, whom he found there, that he should return the next day at which time Duncan expected to obtain a new supply of heroin from "Cotton," an admitted nickname of defendant. The following morning, about 11:00 A.M., Fohrman was first searched by the agents, then furnished with $55 in currency, the serial numbers of which

were recorded. He then returned to the building, arriving about 11:45 A.M., and as he did so his movements were kept under surveillance by agents operating from two cars.

Fohrman was admitted to the building by a woman named Lolita Mallory, and Duncan was seen to enter the building a few minutes later. Within a short time, Fohrman left the building and went to the car of one of the agents where he asked for and was given an additional $15 in currency. He was again searched on this occasion and the serial numbers on these bills were also recorded. Upon his return to the building he gave all of the currency to Duncan and the latter gave it to Lolita Mallory, who left and returned after three hours with a packet of powder that was given to Fohrman. The packet was delivered immediately by Fohrman to the waiting agents and after a field test of its contents showed it to be heroin, Duncan and Mallory were arrested forthwith. They were taken to the Federal narcotics bureau and interrogated. As the result of the information obtained, the agents went to defendant's apartment at 7919 S. Champlain Street, sometime between 1:00 A.M. and 3:00 A.M. on May 21st, and arrested defendant after informing him that the charge was selling narcotics. Defendant admitted the agents to his apartment and in an ensuing search of the premises they found on a bedroom dresser a sum of money which included five one-dollar bills and one five-dollar bill bearing serial numbers corresponding with currency that had been furnished to Fohrman. Defendant's motion to suppress this money as evidence was denied, and it is his initial contention that its seizure without authority of a warrant was in violation of his constitutional rights.

(Appendix)

At the hearing on the motion to suppress, it was admitted that the agents had neither a warrant for defendant's arrest, nor a warrant to search his premises. It was the testimony of Heisig, however, that, prior to the time of defendant's arrest, Duncan had given the officers information that defendant was his source of supply, and that he had instructed Lolita Mallory to obtain the heroin here involved from defendant. In addition, Duncan furnished the agent with the telephone number of his supplier, *viz.*, Triangle 4-3289, a number found to be listed in the name of James Kell, 7919 S. Champlain Street, Chicago, and a check of the bureau's records divulged information that defendant was known to be living at such address under the name of James Kell.

Frank Duncan testified he had agreed, on May 19, 1959, to obtain some narcotics for Fohrman, and that he told the latter on such occasion he "was getting the stuff from Mose Hightower." He related how Fohrman had given him $55, then an additional $15 after leaving for a short period, and testified that he had given all the money to Lolita Mallory with instructions to make a purchase of narcotics. Concluding, the witness said that Mallory returned in about three hours, that she turned over a package of narcotics to Fohrman, and that Fohrman returned in about twenty minutes with two officers who placed the witness under arrest.

According to Lolita Mallory, who corroborated the conversation and transaction of May 20 between Duncan and Fohrman, Duncan gave her the $70 brought by Fohrman and instructed her "to call Triangle 4-3289 and tell Mr. Hightower that he wanted a half ounce of heroin." When she could contact no one at that number, she went

to Oakwood Boulevard where she saw defendant's car and followed it in a taxi to the corner of 38th and Ellis Streets. There she told defendant's chauffeur, a man whom she knew as Eddie, that she wanted to buy a half ounce of heroin and was told to wait at the corner until contacted by May Masters. While waiting, the witness went into the nearby apartment of Schuyler Coward, whom she knew to be a friend of defendant, and was present when Coward received a telephone call from defendant. She said she requested and was permitted to speak to the latter, at which time she told him of her wish to buy some heroin and was instructed by defendant to meet May Masters in the original place. When asked if she had ever talked to defendant on the telephone before, Miss Mallory replied: "Yes, I have. I talked to him every day for the last five or six months." In rebuttal, defendant denied that he had talked to Mallory on May 20, or that he had ever talked with her over the telephone concerning narcotics.

Continuing with the testimony of Lolita Mallory, she related she met May Masters at 38th and Ellis Streets about twenty minutes after defendant's phone call, that she gave her the money and received a package of narcotics which she took back to Fohrman. When cross-examined, she stated she had given a statement to the Federal agents telling them substantially the same things to which she had testified. The record is not clear, however, either from the testimony of the witness or that of agent Heisig, whether the statement to which she referred was made before defendant was arrested.

Since the decision in *United States* v. *Rabinowitz*, 339 U.S. 56, 94 L.ed. 653, it has become an established principle

that the premises where an arrest is validly made, under the control of the person arrested, are subject to search without a search warrant, and that such search is not unreasonable within the prohibition of the United States Constitution. The same interpretation has been placed on the search and seizure provision of our own constitution. (*People* v. *Boozer*, 12 Ill. 2d 184; *People* v. *McGowan*, 415 Ill. 375; *People* v. *Tabet*, 402 Ill. 93; *People* v. *Exum*, 382 Ill. 204.) An arrest without a warrant, such as occurred in this case, is lawful if a criminal offense has in fact been committed and the arresting officer has reasonable grounds for believing that the person to be arrested has committed it. (Ill. Rev. Stat. 1957, chap. 38, par. 657; *People* v. *Fiorito*, 19 Ill. 2d 246; *People* v. *La Bostrie*, 14 Ill. 2d 617; *Draper* v. *United States*, 358 U.S. 307, 3 L. ed. 2d 327.) The test is not whether there is sufficient evidence to convict the arrested man, but probable cause exists for arrest where a reasonable and prudent man, having the knowledge possessed by the officer at the time of the arrest, would believe the defendant committed the offense. (*People* v. *La Bostrie*, 14 Ill. 2d 617; *People* v. *McGowan*, 415 Ill. 375.) If such probable cause is present, then both the arrest and search is lawful; if not, then both must fall. *People* v. *Fiorito*, 19 Ill. 2d 246; *People* v. *Jones*, 16 Ill. 2d 569.

From the record in the instant case, it is our opinion that the agents effected a lawful arrest of the defendant. There is no doubt but that a crime was committed, but the decisive issue is whether the agents had reasonable grounds for believing it had been committed by defendant. In his arguments to this court, defendant takes the position that at no time prior to his arrest had any person told the ar-

resting agents that the narcotics had been purchased from him. Such an argument overlooks the true test for probable cause and essential evidence developed at the hearing on the motion to suppress.

When the maneuver for a controlled purchase of drugs was begun on May 19, 1959, Fohrman, according to the testimony of agent Heisig, returned from Duncan's living quarters and told the agent Duncan had stated he would get narcotics from "Cotton," an admitted nickname of defendant, the following day. This was corroborated by Duncan whose testimony was that he told Fohrman to come back the next day, and that he had confided to Fohrman that he "was getting the stuff from Mose Hightower." Duncan in fact delivered the narcotics to Fohrman the next day, and when the former was taken into custody he informed the agents that he had instructed Lolita Mallory to obtain the narcotics in question from defendant. Mallory in turn, corroborated Duncan saying that on his instructions she had telephoned Triangle 4-3289. At the time of his arrest, Duncan likewise furnished the agents with the telephone number of his supplier, and narcotics bureau records disclosed that the number was one listed for a residence maintained by defendant under the alias of James Kell. These circumstances, we believe, afforded probable cause for the agents, as men of reasonable caution, to believe that defendant had committed the offense under investigation. The arrest being lawful, the subsequent search of defendant's premises was lawful, particularly when it is considered that entry was by defendant's admission, without force or pretext, and that the money seized was in plain view on top of a dresser. (Cf. *People* v. *Heidman*, 11

Ill. 2d 501.) The trial court did not err in denying the motion to suppress.

The evidence for the prosecution adduced at the trial of the cause was, except for the hearsay statements made by Fohrman and Duncan to agent Heisig, substantially the same as has been heretofore related. For the defense, Schuyler Coward testified that Lolita Mallory was not at his residence on May 20, 1959, and that she had not at any time talked with defendant from the telephone in the apartment of the witness. He did admit however, that he knew Mallory and that she had been to his quarters on several occasions.

Defendant took the stand in his own behalf and admitted he had known Lolita Mallory, an ex-fiancee, for about ten years, but denied that he had talked to her on May 20, 1959, or that he had ever sold or caused narcotics to be sold to her. He likewise admitted knowing May Masters for about twenty-five years, saying they had once lived together in a hotel, but testified he had not seen her on May 20 or 21. Almost immediately thereafter, however, he stated he had seen her before his arrest, at which time she had paid him either $10 or $15 on a $25 debt she owed him for a television set.

May Masters, seeking to corroborate defendant, testified she had seen him late in the afternoon before his arrest. Her version was that she owed him a balance of $40 on a television set and that she paid him $15 on such occasion. She said she had received the money, described as being a five-dollar bill and a ten-dollar bill, from Lolita Mallory in payment for a pair of shoes the witness had sold to Mallory.

(Appendix)

While it is defendant's contention that the evidence in the record does little more than excite a suspicion of guilt, we are of the opinion there was sufficient evidence, if believed by the court, to prove defendant guilty of a sale of narcotics beyond all reasonable doubt. Where a jury is waived, the credibility of witnesses, the weight to be accorded their testimony and the inferences to be drawn therefrom are matters best determined by the trial judge who saw and heard the witnesses, and his decision in such matters will not be set aside by a reviewing court unless the judgment rests on doubtful, improbable or clearly insufficient evidence. (*People* v. *Pride*, 16 Ill. 2d 82; *People* v. *Richardson*, 17 Ill. 2d 253.) Here, while there is no evidence of a direct sale by defendant, there is an unbroken chain of circumstances, culminated by the finding of the currency in his apartment, which inexorably establish that defendant did in fact supply the narcotics for the controlled sale which precipitated the charges against him. Such a conclusion is cemented, and all reasonable doubt removed, by Lolita Mallory's testimony of the telephone conversation in which defendant did not disengage himself from the transaction, but approved the terms of the sale and instructed her to meet May Masters as originally directed. It is true that Schuyler Coward contradicted Mallory's testimony in this respect, and it is likewise true that she was an accomplice. The choice between the two witnesses rested with the trial judge, however, and in view of the substantial corroboration of other facets of Mallory's testimony found in the testimony of agent Heisig, Fohrman and Duncan, we cannot say that his choice was in error. In considering all of the evidence, we cannot overlook that defendant and May Masters contradicted each other as to

the status of the alleged debt for the television, and that the latter's testimony with regard to the payment she made in no manner explained defendant's possession of the five one-dollar bills from the controlled currency.

For his final contention defendant asserts there is a complete lack of proof that he was guilty of possession as charged in count three of the indictment, a contention which brings out the fact that although the report of proceedings reveals the trial court found defendant guilty of only a sale, the common-law record reflects a judgment of guilty, both as to sale and possession. However, since defendant was validly adjudged guilty of a sale of narcotics and the sentence imposed was within the statutory limits provided for such crime, (Ill. Rev. Stat. 1957, chap. 38, par. 192.28—38,) it is unnecessary for us to consider whether the proof was likewise sufficient to establish unlawful possession. *People* v. *Randolph*, 2 Ill. 2d 87; *People* v. *Hurt*, 8 Ill. 2d 491; *United States* v. *Roviaro*, (7th cir.) 229 F. 2d 812; *United States* v. *Sferas*, (7th cir.) 210 F. 2d 69.

The judgment of the criminal court of Cook County is affirmed.

Judgment affirmed.